

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

RISING TIDE I, LLC, et al.,

Plaintiffs,

v.

MICHAEL FITZSIMMONS, et al.,

Defendants.

Case No. 17-cv-01232-TSH

DISCOVERY ORDER

Re: Dkt. Nos. 134, 136

In ECF No. 129, the Court ordered Latham & Watkins – Delivery Agent’s former counsel – to produce documents responsive to Defendants’ subpoenas in this and the related action *Abdo v. Fitzsimmons*, No. 17-851. The Court found that there was a presumption that the attorney-client privilege held by Delivery Agent was no longer viable given that the company had ceased to function. Delivery Agent’s Trustee had indicated that he did not intend to waive any applicable privilege but failed to provide a basis to believe a privilege existed.

That order largely resolves the current discovery letter briefs concerning similar subpoenas Plaintiffs have served on Bergeson and Orrick, Herrington & Sutcliffe. *See* ECF Nos. 134, 136. However, Bergeson and Orrick have some additional arguments as well. Bergeson contests the relevance of its communications with Delivery Agent. Bergeson argues that while Defendants are clearly relying on Latham’s legal advice for their advice of counsel defense, it’s not quite clear that they are relying on Bergeson’s advice. However, that argument is flawed. Once Defendants invoke the advice of counsel defense, Plaintiffs are entitled to know all of the advice Defendants received on those subjects, not just the advice relied on. For example, if attorney A says “this plan is a great idea – do it,” but attorney B says “no, don’t do it – that’s illegal,” of course the defendant will say he relied on only attorney A’s advice, but the advice of both attorneys is relevant to

1 determining the merit of the defense. The Court understands that the scope of Bergeson's
2 engagement was not coterminous with Latham's, but the subject matters the two firms were
3 engaged on overlap, making Bergeson's advice relevant.

4 The Court's prior order found that the continued existence of the attorney-client privilege
5 had not been established in light of Delivery Agent's end as a business, and Bergeson submits
6 nothing additional to change that conclusion. Bergeson observes that Hillair acquired
7 substantially all of Delivery Agent's assets in the bankruptcy and later transferred them to
8 Connekt, and these assets included computers that had Delivery Agent's documents on them.
9 From this Bergeson argues that maybe Hillair or Connekt hold a privilege. However, as the Court
10 previously explained, the holder of the alleged privilege has the burden of demonstrating its
11 existence. The Court has seen nothing to indicate that Hillair contends it holds a privilege in
12 Delivery Agent's attorney-client communications, and Hillair's wholesale transfer of the Delivery
13 Agent assets to Connekt is inconsistent with such a position. Likewise, the Court has seen nothing
14 to indicate that Connekt thinks it has a privilege, and indeed the company's voluntary production
15 to Defendants of all of the Delivery Agent documents it received in the asset sale does not tend to
16 demonstrate the current existence of a privilege. Bergeson argues that Defendants themselves
17 claimed to be holders of the privilege. However, Defendants made that assertion only in support
18 of their motion to compel Latham and Watkins, reasoning that if they hold the privilege, they can
19 and have waived it, and thus Latham should be forced to produce attorney-client communications.
20 None of these arguments provide a basis to conclude that a privilege continues to exist and is held
21 by someone who hasn't waived it.

22 With respect to attorney work product, the Court follows *In re EchoStar Communications*
23 *Corp.*, 448 F.3d 1294 (Fed. Cir. 2006), even though this not a patent case. *See United States v.*
24 *Hussain*, 2018 WL 1091083, at *3 (N.D. Cal. Feb. 28, 2018) (also following *EchoStar* outside the
25 patent context). *EchoStar* recognized at least three categories of work product that are potentially
26 relevant to an advice of counsel defense: "(1) documents that embody a communication between
27 the attorney and client concerning the subject matter of the case, such as a traditional opinion
28 letter; (2) documents analyzing the law, facts, trial strategy, and so forth that reflect the attorney's

mental impressions but were not given to the client; and (3) documents that discuss a communication between attorney and client concerning the subject matter of the case but are not themselves communications to or from the client.” 448 F.3d at 1302. The Court held the first category was discoverable and the second category was not. The Court held the third category was discoverable except that it may contain information in the second category that may need to be redacted. This Court adopts that same analysis here.¹

Bergeson says the subpoena is unnecessarily burdensome because it “believes many of the documents requested are in the possession of the parties or other third parties from whom Plaintiffs have taken discovery.” But “believes” and “many” make that argument difficult to do anything with. Bergeson is not claiming that all responsive documents are in the parties’ possession or have already been produced to Plaintiffs, nor is it saying it knows which ones they already have. The argument that Bergeson’s document production will probably overlap to some unknown extent with documents Plaintiffs already have is not a good reason not to respond to the subpoena.

Bergeson also argues that request for production (“RFP”) No. 3 – which seeks time sheets, invoices and bills – seeks information that is irrelevant to the advice of counsel defense. Plaintiffs disagree, arguing that these documents are likely to identify when communications with Delivery Agent occurred, in particular oral communications in calls or meetings that are otherwise undocumented. For example, if Defendants testify that a meeting occurred on a particular day with a particular attorney, but his or her time sheets and the firm’s invoices do not reflect that such a meeting took place, that could undermine that testimony. The Court agrees that RFP No. 3 seeks relevant and proportional information.

¹ Some federal courts have adopted the “entire file” approach to the waiver of work product immunity – meaning that even opinion work product must be produced – in cases where the client’s and the attorney’s interests have diverged. *See S.E.C. v. McNaul*, 271 F.R.D. 661, 666-67 (D. Kan. 2010). The classic example is a legal malpractice action, where uncommunicated opinion work product could be highly relevant. The Court agrees with *EchoStar*, however, that when the waiver of work product immunity is implied as a matter of law from the assertion of an advice of counsel defense, it doesn’t make sense to extend the waiver to uncommunicated opinion work product because by definition it couldn’t have informed the client’s actions. *See* 448 F.3d at 1304.

1 With respect to third party confidentiality concerns, the protective order in this action is
2 sufficient protection. Finally, the subpoena does not implicate the automatic stay in the
3 Bankruptcy Code, and cost shifting is unwarranted here. Accordingly, the Court **GRANTS** the
4 motion to compel against Bergeson except as noted above with respect to uncommunicated
5 opinion work product.

6 With respect to Orrick, the Court agrees with Plaintiffs that the firm's legal advice to
7 Defendants is relevant. Even though Orrick was retained after Plaintiffs received the draft 304
8 response, the advice Orrick provided bears on the reasonableness of the legal advice Defendants
9 received previously, as well as on the factual question of what they relied on. Orrick's
10 communications with Defendants may show if they received contradictory legal advice from
11 different counsel and may indicate the extent to which they relied on legal advice on the subject
12 matter at issue. An advice of counsel defense does not narrowly implicate only the specific advice
13 that was relied on; it implicates all the advice that was received on that subject matter, in part to
14 test the reasonableness or fact of the reliance.

15 The Court understands that when a corporation is in bankruptcy, control of the
16 corporation's attorney-client privilege is vested in the trustee. The Court's prior order at ECF No.
17 129 addressed a different issue, namely the line of case law holding that when a corporation has
18 ceased to function there is a presumption that the attorney-client privilege is no longer viable.
19 Delivery Agent has ceased to function, and Orrick offers nothing to establish the existence of the
20 privilege. As before, the Trustee's statement that he is not waiving any privilege he may have
21 does not establish the existence of the privilege. Finally, as discussed above, the Court agrees
22 with Orrick that never-communicated opinion work product is not discoverable under *EchoStar*.

23 Accordingly, with the exception of uncommunicated opinion work product, the motion to
24 compel Orrick to produce documents responsive to Plaintiffs' subpoena is **GRANTED**.

25 **IT IS SO ORDERED.**

26 Dated: November 22, 2019

27 
28 THOMAS S. HIXSON
United States Magistrate Judge